In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-623

THOMAS KEE MING HSU, PETITIONER

v.

GEORGE L. HART, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals wrote no opinion. Its *per curiam* order denying a petition for a writ of mandamus appears at Pet. App. 1a. The order of respondent, District Judge George L. Hart, transferring the declaratory judgment action to the United States District Court for the Middle District of Pennsylvania, appears at Pet. App. 2a.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1971. The petition for a writ of certiorari was filed on November 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an action against the Board of Parole challenging its denial of an application for parole, brought in the United States District Court for the District of Columbia by a federal prisoner who had not been tried and was not confined in the District, was properly transferred pursuant to 28 U.S.C. 1404 (a) to the federal district in which the prisoner was incarcerated.

STATEMENT

In 1968, petitioner was convicted in the United States District Court for the Southern District of New York on eleven counts of a twelve-count indictment charging him with wire fraud, causing the interstate travel of a victim in execution of a fraudulent scheme, and causing the interstate transportation of money taken by fraud, in violation of 18 U.S.C. 1343 and 2314. He was sentenced to a total of eight years' imprisonment. *United States* v. *Kee Ming Hsu*, 424 F. 2d 1286 (C.A. 2), certiorari denied, 402 U.S. 982. He is confined at the Federal Prison Camp at Allenwood, Pennsylvania (Pet. 3).

On November 2, 1970, having completed service of one-third of his sentence, petitioner became eligible

for parole pursuant to 18 U.S.C. 4202 and 4203. On November 13, 1970, the Board of Parole denied an application by him to be released on parole and continued the matter for further consideration in January 1972 on the basis of a requested progress report. On March 10, 1971, through counsel, petitioner requested the Board to reconsider its initial decision. The petition included a request that petitioner be advised of the grounds of the denial of his application and that he be afforded an opportunity to provide evidence in refutation of any material in his file record which may have been the basis of the Board's action. On March 19, 1971, the Board advised petitioner through his attorney that it had considered his request for reconsideration but that review of his file record did not indicate that any change in the Board's decision was warranted. The response made no direct reference to counsel's other requests, stating simply that the Board did not feel that a Washington Appellate Hearing was warranted at that time (Pet. 3).

On April 5, 1971, petitioner filed in the United States District Court for the District of Columbia a civil action against the Board of Parole requesting a declaratory judgment that he was entitled to a statement of the reasons for denial of his request for parole and to present evidence in refutation of any adverse evidence in his file and that the Board's denial was arbitrary, unsubstantiated by substantial evidence, and in violation of his right to a hearing. On May 26, 1971, the Board, through the United States Attorney, moved pursuant to 28 U.S.C. 1404(a), and on the authority of *Young* v. *Director, U. S. Bureau*

of Prisons, 367 F. 2d 331 (C.A. D.C.), that the cause be transferred to the United States District Court for the Middle District of Pennsylvania, where petitioner was and is confined. On August 4, 1971, that motion was granted by District Judge George L. Hart, the order noting that there were "no extraordinary circumstances present in this case warranting retention in this jurisdiction" (cf. *Young*, *supra*, 367 F. 2d at 333) (Pet. 3-4; Pet. App. 2a).[1]

On August 20, 1971, petitioner filed in the United States Court of Appeals for the District of Columbia Circuit a petition for a writ of mandamus ordering Judge Hart to vacate the transfer order and to entertain the action in this district. On October 5, 1971, the court of appeals, *per curiam*, denied the petition without opinion (Pet. App. 1a).

ARGUMENT

The transfer order was proper under the change of venue provisions of 28 U.S.C. 1404(a), and was required by *Young* v. *Director, U. S. Bureau of Prisons*, *supra*. Hence the court of appeals' refusal to interfere through mandamus was correct and no question meriting further review is presented.

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[1] Judge Hart contemporaneously denied a motion by petitioner for a statement pursuant to 28 U.S.C. 1292(b) (authorizing interlocutory appeal of an otherwise unappealable order, where the judge is of the opinion that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation) (Pet. App. 2a).

Young, supra, held that in the absence of extraordinary circumstances declaratory judgment actions against the Board of Parole, brought in the District of Columbia by federal prisoners who had not been sentenced and were not confined in the District, and seeking the resolution of issues under the parole statutes in no way related to the District, should be transferred pursuant to Section 1404(a) to the district where the plaintiff was incarcerated. As the opinion in that case indicated (367 F. 2d at 332-333), transfers under these circumstances were proper since, if an evidentiary hearing was necessary to resolve disputed factual issues, the inmate would be readily available; moreover such transfers accorded with the expressed desire of Congress—in amending, in 1962, the general venue statute (28 U.S.C. 1391)—to reduce congestion in the "already heavily burdened" District Court for the District of Columbia by making it possible to bring suits against federal agencies in other federal districts. The court directed that if similar cases were brought in the District of Columbia the pleadings should be examined to see whether any compelling reason existed for litigating the matter in this jurisdiction and that, if not, transfer to the district of confinement would be in order. The court noted that while there might be exceptional circumstances in individual cases which would warrant retention of jurisdiction in situations of the type there considered it seemed to the court they would be rare (367 F. 2d at 333).

Like the plaintiffs in *Young*, petitioner neither was tried nor is confined in the District of Columbia, and

he, like them, seeks the resolution of issues having no particular relationship to the District. Judge Hart, consequently, properly concluded that transfer of petitioner's suit was required by that decision. That the *Young* plaintiffs were parole violators, whereas petitioner is simply applying for parole, is not, contrary to a suggestion of the petition (Pet. 9), a sound basis for distinguishing that decision. Under the parole statutes the Board of Parole is given authority to release on parole, after service of a third of his sentence, any prisoner "whose record shows that he has observed the rules of the institution in which he is confined," if it appears to the Board that he will probably refrain from violating the laws and if release is compatible with the welfare of society (18 U.S.C. 4202, 4203(a)). It is thus apparent that in any hearing inquiring into whether the Board has acted arbitrarily in denying petitioner parole, potential witnesses would include, in addition to petitioner himself, the officials at the penal institution where he is incarcerated. Potential documentary exhibits, similarly, would include the prison records reflecting his deportment. Thus it is appropriate to apply the *Young* rule to cases like this one.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1971.

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